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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 570.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

VS.

NORTHERN PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MINNESOTA.

FILED AUGUST 17, 1909.

(21796)



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1 UNITED STATES OF AMERICA.

NORTHERN PACIFIC RAILWAY COMPANY, complainant, vs. THE INTERSTATE COMMERCE COMMISSION, defendant.	}	Equity No. 893.
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Pleas before the honorable the judges of the Circuit Court of the United States of America for the Third Division of the District of Minnesota of the December, A. D. 1908, term of said court held in the city of Saint Paul in said district, in the year of our Lord 1908.

DISTRICT OF MINNESOTA, ss.

Be it remembered that on the 25th day of May, A. D. 1909, came the complainant above named by its solicitors and filed in the clerk's office of said court its bill of complaint in the words and figures following, to wit:

2 In the Circuit Court of the United States for the District of Minnesota.

NORTHERN PACIFIC RAILWAY COMPANY, complainant, vs. THE INTERSTATE COMMERCE COMMISSION, defendant.	}
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Bill of complaint.

To the judges of the Circuit Court of the United States, District of Minnesota, in equity sitting:

The Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, brings this its bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of Congress of the United States, and thereupon your orator says:

It is a common carrier engaged in the transportation of both persons and property, and its railway extends from Saint Paul, Minneapolis, and Ashland on the east to Puget Sound points and Portland on the west, and as such carrier it is subject to the act of Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof. It has its principal operating office in the city of Saint Paul, State of Minnesota.

Your orator purchased in 1896 the railway system formerly belonging to the Northern Pacific Railroad Company, a corporation chartered by the act of Congress of July 2, 1864. It made such purchase for the purpose of transporting freight and passengers over its lines of railway, particularly freight and passengers between its eastern termini and its western; and since 1896 it has

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spent many millions of dollars in improving its railway and in perfecting its service for the purpose very largely of transporting freight and passengers between its said termini; and it has established through routes and through service beyond its own lines. Your orator several years ago, for the purpose of establishing permanent through rates and service between all points on the Burlington and its own western termini, joined with the Great Northern Railway in the purchase of the Chicago, Burlington & Quincy system, which connects with your orator's line at Saint Paul and Minneapolis and at Billings in Montana. After such purchase your orator established and has since maintained joint routes and rates from all points on the Burlington system to Puget Sound, and it has maintained joint routes and rates from Chicago to Puget Sound via other lines connecting with your orator at its eastern termini. For some years it has maintained with the Burlington system through train and through car service to and from Puget Sound points.

From Saint Paul to Tacoma and Seattle via your orator's line is substantially nineteen hundred (1,900) miles, and from Billings to Tacoma and Seattle is substantially one thousand (1,000) miles. From Portland to Tacoma via your orator's line is about one hundred forty (140) miles, and from Portland to Seattle about one hundred eighty (180) miles.

From all points on the Missouri River and from Chicago and all points east of the Missouri River the distance to Puget Sound points via your orator's line in connection with the Burlington system and other railways is shorter than the distance to Puget Sound points via the Union Pacific Railway and its proprietary lines through Portland; and the time of travel from every point on the Missouri River and every point east thereof to Puget Sound points is less via your orator's said lines than via Portland. Also the through train and through car service is better via your orator's lines than via Portland, and in every other respect the service and accommodations to passenger travel via your orator's lines are at least as good as those of the line through Portland.

On or about the 14th of April, 1908, the defendant commission of its own motion instituted an inquiry as to whether a joint route and through joint rates for the carriage of passengers and their baggage ought to be established by order of the commission between points on the Northern Pacific Railway in the State of Washington and Chicago, Illinois, and other points on the Chicago & Northwestern, and Omaha, Kansas City and other points on the Union Pacific Railway. Your orator, the Chicago & Northwestern Railway Company, the Union Pacific Railway Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company were made parties and served with notice by the commission. Afterwards such further proceedings were had before the defendant commission that on the 4th day of May, 1909, it filed its opinion and order in the words following, that is to say:

In the matter of through passenger routes via Portland, Oreg.

Submitted April 3, 1909. Decided May 4, 1909.

The Northern Pacific Railway Company, the Union Pacific Lines, and the Chicago & Northwestern Railway Company ordered to join in the sale of through passenger tickets between Seattle and other points in the Northwest and eastern destinations, via Portland, Oreg., and to accord through facilities, like the checking of baggage, over this route.

A. H. Lossow for the Interstate Commerce Commission.

C. W. Bunn for Northern Pacific Railway Company.

S. A. Lynde for Chicago & Northwestern Railway Company.

N. H. Loomis, P. L. Williams, W. W. Cotton, and F. C. Dillard for Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon Railroad & Navigation Company.

Report of the commission.

PROUTY, commissioner:

The Northern Pacific Railway Company declines to join in the sale of through tickets between Seattle and other points in the Northwest and eastern destinations via Portland, Ore., and to accord through facilities, like the checking of baggage, over this route, and this leads to much annoyance and has been the source of much complaint. The commission, being in receipt of complaints from the traveling public, and deeming the subject of sufficient public importance to require investigation, has instituted this proceeding upon its own motion for the purpose of determining the right of the matter and, if necessary, entering an order for the establishment of through routes and joint rates.

The Northern Pacific Railway Company, the Chicago & Northwestern Railway Company, and the Union Pacific lines, namely, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company, were made parties and required to answer. The Northern Pacific justifies its refusal. The answers of the various Union Pacific companies are in the nature of complaints themselves: they aver that a through route should, for reasons set forth, be opened, and ask that the commission establish such joint rates.

The parties have furnished certain information called for by the commission itself, have introduced such testimony as they severally desired, and have presented the case on brief and oral argument.

In this discussion Tacoma will be taken as illustrative of those points in the Northwest which are involved. The Northern Pacific Railway extends from St. Paul to Tacoma, and it also operates a line

from Seattle through Tacoma to Portland. Numerous lines of railway lead from Chicago to St. Paul.

The Union Pacific lines extend from Omaha to Portland, and various other lines connect Chicago and Omaha.

Hence, a passenger at Chicago can reach Tacoma either via St. Paul and the Northern Pacific or via Omaha and the Union Pacific lines to Portland and from Portland via the Northern Pacific.

The Chicago, Burlington & Quincy Railroad, which is owned and controlled by the Northern Pacific and the Great Northern jointly, runs from Omaha, Kansas City, and other Missouri River points to Billings, Mont., where it connects with the Northern

7 Pacific. The Union Pacific lines extend from Omaha, Kansas City, and other Missouri River points to Portland. Passengers at the Missouri River may therefore travel to Tacoma either via the Burlington route to Billings and thence via the Northern Pacific or via the Union Pacific lines to Portland and thence via the Northern Pacific.

Since practically all passenger traffic between territory east of the Missouri River can and does pass through Chicago and Missouri River points en route for Tacoma, the points above selected fairly illustrate the general situation and the questions presented.

When the northern route is used the Northern Pacific may carry the passenger from St. Paul to Tacoma, a distance of 1,900 miles, and must carry him from Billings, a distance of about 1,000 miles, while if the Union Pacific route is selected, the Northern Pacific can only transport the passenger from Portland to Tacoma, a distance of 140 miles. The Northern Pacific declines to make joint rates with the Union Pacific lines, for the reason that to do so would be to encourage the movement of travel through Portland, and thereby to deprive it of the privilege of carrying the passenger by the other route and thus obtaining the long haul.

The act to regulate commerce empowers this commission to establish a through route and joint rate in cases like the present, provided no satisfactory through route already exists. The Northern Pacific insists that it already affords a satisfactory through route to points upon its line north of Portland, and hence that the commission has no jurisdiction to open the Portland gateway, even though, as a matter of discretion, it might be of the opinion that this ought to be done.

In *Pacific Coast Lumber Mfrs. Assn. v. Northern Pacific*
8 *Ry. Co.*, 14 I. C. C. Rep., 51, the commission passed upon an application to open the Portland gateway to the movement of lumber from Tacoma and similar points to eastern destinations over the lines of the Union Pacific and its connections. In that proceeding we held that the Northern Pacific and Great Northern already furnished a satisfactory route to Colorado common points, which are Cheyenne, Denver, Pueblo, and points in that general line north and south, and all territory east, but that there was no satisfactory through route to territory west of Colorado common points, and we

established joint rates applicable to that territory to which no satisfactory route was found to exist.

Up to the time that case was decided, and indeed when this proceeding was begun, there was no joint through passenger tariff between the Union Pacific lines and the Northern Pacific through Portland. Since then the Northern Pacific has expressed a willingness to establish joint passenger schedules from Colorado common points and territory west to Tacoma and similar points and such tariffs are now in effect. It still refuses to make joint rates from territory east of Colorado common points. It insists that the same considerations which led us to hold in case of lumber, that a satisfactory route already existed by the northern lines to that territory, must control our action in the present case.

In the report of that case, at page 59, we said:

"Attention should be called to the fact that a wide difference exists between a reasonable through route for the movement of freight and one for passenger traffic. There enters into the passenger service a personal element which does not exist in the case of property. We might well say that a passenger should have the right to journey from Seattle to Omaha via Portland with the conveniences of a through service, although a carload of lumber was not entitled to that privilege."

This was not intended to indicate what would be a satisfactory passenger route, but simply to reserve for consideration that
9 question, which is now for the first time before the commission in this proceeding.

In order to defeat the jurisdiction of the commission the existing route must, in the language of the statute, be "reasonable or satisfactory." This, we think, is equivalent to "reasonably satisfactory." The dissatisfaction of the passenger must spring from some reason and not be the product of mere whim.

The first inquiry is, With respect to whom must this route be satisfactory? This same question might arise in case of freight traffic. A route satisfactory to one kind of freight might not be satisfactory with respect to another. Most commodities are indifferent to heat and cold, and it is therefore immaterial whether they are carried through high or low temperatures. Fruits and vegetables may be injured and indeed totally destroyed by freezing or overheating. It might well happen, therefore, that a route entirely satisfactory as to most kinds of freight would not be satisfactory to these perishable articles.

In the case of freight it is possible to distinguish between different commodities and to establish a through route as to one article and not as to another; but with passengers this can not be done, since whatever joint rate is ordered must be open to the general public. It would seem, therefore, that if the existing route is unsatisfactory to any considerable portion of the public desiring to use some route, then it should not be held reasonably satisfactory.

To state this in another way: The caprice or even the proper desire of an occasional passenger should not govern, but if any considerable part of the traveling public reasonably prefer to use some other route rather than the one existing, then the existing route cannot be called a reasonable and satisfactory through route. - We ought
10 to inquire, therefore, in the present case, whether any substantial part of the entire body of travelers moving between these points in the northwest and eastern destinations does reasonably desire to travel via Portland. If so, this commission has jurisdiction to open that gateway.

And this is the reasonable conclusion from all the provisions of the act which bear directly or indirectly upon this establishment of through routes and joint rates. Under the original act it was provided that different railroad companies should interchange traffic with one another; but the act contained no provision by which the details of this interchange could be determined, and the courts held that, as at the common law, it was for the carriers to determine for themselves what arrangements for through business should be entered into and upon what terms. The act was finally amended so as to give to the commission authority to prescribe through routes and joint rates, and to fix the terms and conditions under which these routes should be operated; but the commission was only authorized to do this where no reasonable or satisfactory route already existed. The plain intent of all these provisions comes to this: The public shall be properly served. So long as it is properly served the carriers may themselves determine upon the means by which the service shall be rendered. The fundamental question in every case is, Are the public necessities, under all the circumstances, fairly met? Such is the question here. Considering fairly the legitimate desires of those who use these railway lines, ought the facilities of through travel via the Portland gateway to be accorded, or is the present arrangement reasonable and satisfactory?

By what test are we to determine what is reasonable and
11 satisfactory? The Northern Pacific contends that the same considerations which apply in case of freight must also control in case of passengers; that reference can only be had to the incidents of the transportation itself; that if it offers a route by which the passenger can be taken as quickly and with the same physical comfort, then the passenger can not reasonably prefer another route.

The distance from both Chicago and the Missouri River to Tacoma via St. Paul or Billings is somewhat less than via Portland. From Chicago via St. Paul the distance is 2,319 miles, while via Omaha and Portland it is 2,436 miles. From Omaha via Billings the distance is 1,909 miles, via Portland 1,913 miles. The running time from Chicago and the Missouri River is somewhat less via St. Paul and Billings than via Portland. The train service from St. Paul is equally good with that from Omaha. At the present time there is but one through train from the Missouri River via Billings, with a

second train involving a change of cars at Billings and a lay over. It was stated upon the hearing that another through train would be put on in the near future and permanently maintained.

On the whole it seems to be true that from the greater part of the territory in question, and we are only considering the matter in its broad aspect, the distance via the northern lines is somewhat shorter and the time somewhat less. The passenger goes in as good a car and is provided with as good a berth and as good a meal. Beyond this the Northern Pacific declares the passenger must not look.

It is evident that, looking entirely to the physical comfort of the passengers, the northern line is not always as satisfactory as the southern. That route traverses a section of country where the cold is much more severe in winter and longer continued. The snows are more frequent and deeper. Interruption of travel from snow blockade and similar causes is much greater. Passengers
12 might find it not only less comfortable, but in some instances even dangerous, to take the journey by this route, although by the southern line it might be undertaken with comfort. Upon the other hand, during the heated period of the summer the northern route may be much cooler and cleaner than the southern.

So, too, looking entirely to the certainty with which one reaches in a given time his journey's end, the southern route may at times pre-ent advantages over the northern, which would lead a reasonable man to prefer it. The severe weather during the winter months interrupts to some extent travel upon that line. The period of high water comes at a different time upon the southern lines than upon the northern. Communication may be more certain at one period of the year by one line and at some other period by the other line. We are considering the character of these routes, not with respect to a single day or a single season, but with respect to the whole year and to a series of years. May it not be well said that the traveling public, even if the test suggested by the Northern Pacific were the correct one, even if the only inquiry was whether the passenger could reach his journey's end with certainty and comfort, are entitled to have these two routes open; and can it be said that the public should be confined at all times to the use of either one?

But these are minor considerations. The real question is that suggested by the commission in the extract from the Lumber case, already given. Is there not a distinction between inanimate freight and human beings? Does not the element of personal preference properly enter into the determination of this question?

Let this situation be clearly understood. If the passenger travels
13 by the Northern Pacific route, he can pass, broadly speaking, through no territory lying west of the Missouri River and south of the main line of the Northern Pacific. If he goes via Portland, he can select any one of the great variety of routes traversing this southern territory as far as Ogden. From Ogden he must go by the Union Pacific lines. The question is, therefore, whether the passenger desiring to go from some eastern point to

Tacoma must patronize the northern route or whether he may properly prefer to pass over some one of these southern routes.

A passenger by the Union Pacific route may visit numerous cities which he could not reach via the northern lines, like Denver, Pueblo, Salt Lake City, Ogden. In these cities are many objects of interest which he may desire to behold. He may have friends upon some of these routes whom he wishes to visit, and most of these lines allow liberal stopover privileges, of which the traveler may avail himself. Shall he be deprived of all this and compelled to travel by a route which may possibly extend the same privileges, but upon which those privileges are to him utterly useless?

The portion of our country which to-day presents the greatest opportunity for the acquisition of new homes and the opening of new enterprises is that traversed by these transcontinental lines. The United States Government is expending vast sums of money for the purpose of bringing into cultivation hundreds of thousands of acres of land. Many home-seekers visit the northwest, and inducements are held out to such travelers by all the railways. Shall not the passenger in search of a home have the right to go by whatever one of these various routes he selects?

Some lines present much greater scenic attractions than others, and the scenery differs greatly upon different lines. May not a traveler reasonably select his route with reference to the natural beauties

which it offers? May he not properly desire to inform himself
14 of the extent and character of the country of which he is a citizen? Being familiar with one line, may he not reasonably desire to behold the beauties and the business advantages of some other line?

The education and gratification of the sense of the sublime and the beautiful have been recognized in all ages as distinguishing marks of civilization. Governments often provide at the public expense objects of beauty to be gazed upon by the masses. Can it be said that the desire to behold what is attractive in nature is not a desire which the traveler may reasonably indulge? Is this an age so intensely material that the only test of reasonable satisfaction is business necessity and animal comfort?

The United States Government has reserved and set apart a national park where the citizens of our land may behold the beauties of nature. It has withdrawn from the possible touch of materialism and reserved for the contemplation of present and future ages a portion of our country; and is it to be said that a wish to behold these marvels, which have been set apart for the sole purpose of being looked at, is not a reasonable wish? May not a traveler reasonably elect that route which will enable him to do this? And if it is reasonable to desire to behold the marvels of Yellowstone Park, is it not equally reasonable to wish to behold the scenic beauties of the Denver & Rio Grande?

It may be profitable to bring this contention of the Northern Pacific to the test of a practical illustration. The Union Pacific lines extend

from Ogden to Portland, and they are the only lines by which the traveler, having arrived at Ogden, can reach the city of Portland. From Omaha and Kansas City, as well as from Denver, the Union Pacific maintains a line to Ogden. Passengers on the Missouri River or at Colorado common points desiring to visit Portland can go via the Union Pacific lines, and those lines are the shortest and the quickest and are provided with the best of equipment and service.

It is possible for the traveler leaving Chicago or St. Louis for Portland to go by a great variety of routes to Ogden. He may take the Burlington or the Rock Island or the Missouri Pacific or the Santa Fe. Being arrived at Colorado common points, he may proceed to Ogden via the Denver & Rio Grande or the Colorado Midland, as well as by the Union Pacific.

Now, may the Union Pacific say to the traveling public, "We offer you a line from the East to Portland as short, as quick, as comfortable; therefore you must travel by our route. If you see fit to travel by any other route up to Ogden you must, upon your arrival there, stop, recheck your baggage, rearrange your Pullman accommodations, purchase a local ticket—in short, go as a local passenger from Ogden to Portland. We will make no through route and no through arrangement with any line which leads from the East to Ogden, because we furnish a satisfactory line of our own which you must patronize."

No proposition of that sort would be tolerated for a moment; and why? Because it is instinctively recognized that a passenger at some eastern destination may properly select, and should be permitted to select, the route by which he will reach Ogden on his way to Portland.

So of the situation before us. Just as Ogden is a gateway through which streams of travel converging from various directions naturally pour, so does travel from the East to the Northwest flow through the city of Portland.

The parties were required to furnish a statement showing the number of passengers who actually do, even at the present time, travel between these northwestern points and eastern destinations via Portland. Those statements cover five years—from 1904 to 1908, inclusive—and show the total number of such passengers to be nearly 40,000, an average of 8,000 persons per year, or 22 per day. A good deal of testimony was introduced by the Union Pacific lines to show a desire upon the part of the traveling public to go via Portland, and that testimony does, of itself, conclusively establish the fact; but the most satisfactory proof is the actual record of what daily happens.

We are of the opinion, and find, that a substantial part of those actually making the journey between these points in the Northwest and various points in the East to the east of Colorado common points prefer to travel via the lines which lead finally through the Portland gateway. We are of the opinion that the desire of this portion of the public to use those routes is a reasonable one, and

therefore that the northern route offered by the Northern Pacific is not, within the contemplation of the statute, and as to such travelers, a reasonable or satisfactory through route.

The statute provides that the commission may establish through routes and joint rates, but does not require it to do so. There is, therefore, in this case the further question: Ought we, under all the circumstances, to open this Portland gateway?

The first-class passenger fare from the territory in question is the same to Portland, Tacoma, and Seattle, and the Pullman fare is also the same to these three destinations. The local fare from Portland to Tacoma over the Northern Pacific is \$1.35, the berth fare \$2, and the seat fare 75 cents. If, therefore, a passenger were compelled to pay the transcontinental fare to Portland and the local fare from Portland to Tacoma, it would cost him \$1.35 extra without the Pullman accommodations, whereas if the same rate were applied via Portland which obtains via other gateways this extra local fare, both railroad and Pullman, would be saved.

17 It will hardly be claimed that there is any substantial reason why the 8,000 persons who annually journey through Portland to Tacoma and similar points should be required to bear these additional charges when the Union Pacific lines stand ready to name the same through rate via Portland and to allow the Northern Pacific its full local. If, therefore, this were the actual situation we should have no hesitation in saying that the through route should be established.

In point of fact the Union Pacific at the present time accords to individuals desiring to reach Tacoma what it terms a "side trip." It sells to the passenger a ticket to Portland, to which is attached a coupon entitling him to a first-class ticket from Portland to Tacoma. The Northern Pacific and the Union Pacific occupy a union depot at Portland, and the ticket agent at that station is a joint agent. This coupon must be presented to that joint agent, who delivers to the passenger a Northern Pacific ticket and who pays to the Northern Pacific Company from the Union Pacific Company's funds in his hands the full local fare. Baggage can only be checked to Portland, and the passenger is obliged to have this rechecked at Portland.

The testimony shows that agents at the point of origin as a rule inform passengers desiring to purchase tickets via Portland of the method which must be pursued at Portland in obtaining transportation and checking baggage beyond; that in some instances the passenger has declined to go by this route, but that usually, notwithstanding the difficulties, the passenger, while often demurring at the hardship, takes the route which he has selected.

It appeared that very much annoyance and inconvenience was occasioned at Portland. Sometimes it happened that passengers would board the Northern Pacific train without having exchanged the order for a ticket, under the impression that the order was itself a ticket. The greatest difficulty was experienced in the handling of baggage; in many instances the passenger

would go on under the impression that his baggage had been checked through. Frequently the baggage had not actually arrived at Portland upon the same train with the passenger. These difficulties were oftenest experienced by those who would suffer most from the annoyance and be less able to rectify the mistake—women and children unattended and persons of little experience in traveling. These mistakes are of daily occurrence and occasion very serious inconvenience.

The legality of the present expedient employed by the Union Pacific to work business through this gateway is extremely doubtful. The number of passengers who actually take this route is not materially less than it would be if a through route was established. Some few travelers are doubtless deterred by the difficulties of passing through Portland from taking this line, but the testimony fairly shows that this number is insignificant. The present arrangement imposes a great hardship upon the traveling public and results in practically no benefit to the Northern Pacific. If the Northern Pacific has the right to close this gateway, it should be closed, and the public should understand it; if it has not that right, then the gateway should be opened. The present situation produces much irritation, and is of no substantial benefit to the Northern Pacific.

It should also be noted that under the present arrangement, while the passenger receives his train fare from Portland to destination, he is obliged to pay the additional Pullman fare, whereas it was stated upon the hearing that the Pullman Company would sell, if there were a through route, a ticket to Tacoma for the coast price, which would entitle the passenger to space between Portland and Tacoma.

At the present time the passenger at Chicago may travel on a through ticket via St. Paul and the Canadian Pacific lines to Tacoma, in which event the Canadian Pacific carries the passenger to Sumas and the Northern Pacific from Sumas to Tacoma, a distance of about 160 miles. That passenger may also go via St. Paul and the Great Northern, the Northern Pacific securing the transportation from Seattle to Tacoma, a distance of 41 miles.

We feel that the passenger should also have the right to journey upon a through ticket via Portland, in which event the Northern Pacific would obtain a haul of 140 miles.

The right of a railroad to control its traffic by the making of arrangements for through routes and joint rates for the handling of both passenger and freight business is a thing of value to the railway, which should be protected in so far as it can be without infringing upon the right of the public; but these railroads are public servants and it is their first duty to accord to the public proper facilities.

We are in receipt of numerous letters, of petitions from various communities, from boards of trade and other commercial organizations, asking that this gateway be opened. The railroad commission of Oregon has joined its request, all of which indicates that there is a public demand for this route.

This commission has held that, with respect to freight business, the Northern Pacific and the Great Northern may absolutely control all territory east of and including Colorado common points. It is no hardship to say that, with respect to passenger business, the Northern Pacific must open its lines to this transcontinental travel.

We are of the opinion that the through rates via Portland should be the same as those in effect via the Northern Pacific and its
20 present connections. No opinion is expressed touching the division of these rates. The public interest requires that this gateway shall be opened; but the terms under which that service is rendered should be just as between the carriers themselves. The local fare upon the line of the Northern Pacific is not of necessity the measure of its division. If the carriers do not agree application can be made to the commission, which must then hear the parties and decide the question.

KNAPP, Chairman, dissenting:

The majority report summarizes concisely the law in respect of the establishment of through routes and joint rates in the following language:

"The statute provides that the commission may establish through routes and joint rates, but does not require it to do so."

It follows, then, that before the commission can lawfully exercise its discretion in this respect, it must find that no reasonable or satisfactory through route exists; and when its jurisdiction is thus established its discretion must be exercised upon sound considerations of justice to the public and the carriers. In this proceeding I conceive that both the jurisdictional facts and the equitable considerations essential to the lawful and proper exercise of the commission's authority are altogether lacking.

It appears from the record and is conceded by the majority that from all Missouri River points and territory east thereof the route already established offers to the public as reasonable fares and as comfortable accommodations as would be afforded by the proposed Portland route, and that in distance and time it is somewhat shorter. This being so, the existing route must, in my opinion, be held both reasonable and satisfactory within the meaning of the statute. Cer-

21 tainly the route shortest in time and distance, and equal to any other in the comforts provided for the traveler, can not be called an unreasonable route; and I assume, without arguing the point, that the term "satisfactory" as used in the statute is practically synonymous with "reasonable." Moreover, it seems to me that the majority err in taking into account, to the extent indicated, the incidental desire of the passenger to stop at intermediate points or to travel by a variety of routes. In my judgment, all that can be asked by a person seeking transportation from, say, Chicago to Tacoma is expeditious and comfortable passage between those two points. If he desires stop-over privileges or to visit cities which are not upon the reason-

able route already established he is asking an additional service or privilege for which extra compensation may properly be exacted.

The absence of opportunities of this sort, or the lack of attractive scenery, does not make the quickest and otherwise satisfactory route an unreasonable one to be condemned as inadequate by the commission.

Much stress appears to be laid upon the inconvenience to passengers over the Union Pacific route of rechecking baggage and exchanging tickets at Portland. Even conceding that this is germane to the issue, it seems to me to arise largely because the Union Pacific, in order to secure the long haul to Portland, advertises a through route to Puget Sound which does not in fact exist. Under the present practice of the Union Pacific, the legality of which is not now considered, the passenger to Puget Sound pays no extra fare in order to gratify his desire to travel by that route, and it would seem that the trouble of rechecking baggage and exchanging tickets at Portland is fully compensated by the business convenience of stop-over privileges and other advantages of an incidental or personal nature.

But assuming, though not conceding, that the jurisdictional basis for an order exists, there are controlling reasons, as I think, for declining to take such action. The expensive terminals of the Northern Pacific at Tacoma and Seattle were not provided for local business from Portland, and apparently could not be afforded for that local travel. Those terminals are supported by traffic over the whole system. The order of the commission in this case in effect places the Union Pacific in substantially the same position as it would be if it had built its own railroad from Portland to Tacoma, some 140 miles. Except in so far as the regulating statute may prevent, carriers are at liberty to take such measures as may be proper to secure and retain traffic upon their own lines. I can not agree to a ruling in this matter which would go far to commit us to the proposition that a company might now build a railroad from, say, Trenton, N. J., to Crown Point, Ind., and successfully demand that the Pennsylvania system be required to join it in through routes east or west between New York and Chicago. Suppose the Northern Pacific ended at Tacoma and the Oregon Railroad and Navigation extended from Portland to Tacoma. Would it be just to require the Northern Pacific to unite with the Oregon Railroad and Navigation in joint rates to Seattle? In the absence of a real public necessity it seems plainly inequitable, by compelling connections and through routing, to take from a carrier traffic for the accommodation of which it has expended millions of dollars and practically turn over that traffic with the use of the carrier's terminals to a competitor which does not see fit to provide for itself the needful railway and terminals.

With reference to the exercise of discretion, it is of course true that the conclusions of the majority in this case will not be controlling in other proceedings as each case must be judged in the light of its special conditions and circumstances. Nevertheless, the fact that the order made herein, if followed in cases of a similar character, will reverse the common practice of carriers of

reserving to themselves the long haul where they can furnish satisfactory accommodation—a practice justified by the business welfare of the carrier, and nowise at variance with its public duty—suggests to my mind that the commission should not compel through routes and joint rates except upon a disclosure of real and substantial public inconvenience and hardship which could not otherwise be avoided. In my judgment no such disclosure has been made in this case.

I am authorized to say that Commissioner Clark unites in this dissent.

24

Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of May, A. D. 1909.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

No. 1544.

In the matter of through passenger routes via Portland, Oreg.

This case being at issue upon complaint and answers on file, and the matters involved having been fully heard and submitted, and it appearing that the carriers named in paragraph 2 of this order have neglected and refused to voluntarily establish through routes and joint rates for the transportation of passengers and the baggage of such passengers over their lines of railway from Chicago, Ill., and other points on the Chicago & North Western Railway between Chicago, Ill., and Council Bluffs, Iowa, including the latter point, and from points on the Union Pacific Railroad between Colorado common points, so called, on the west, and Omaha, Nebr., and Kansas City, Mo., on the east, including the latter two points, via Portland, Oreg., to points on the Northern Pacific Railway, in the State of Washington, between Portland, Oreg., and Seattle, Wash., including the latter point, and in the opposite direction from said points on the Northern Pacific Railway, via Portland, Oreg., to said points on the Union Pacific Railroad and on the Chicago & North Western Railway; and it further appearing that no reasonable or satisfactory through route for such transportation exists between any of said eastern points on the one hand and any of said western points on the other hand:

25

It is ordered, That the Chicago & North Western Railway Company, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, the Oregon Railroad & Navigation Company and the Northern Pacific Railway Company, be, and they are hereby notified and required to establish on or before July 1, 1909, and maintain in force thereafter, during a period of not less than two years, through routes and joint rates applicable thereto, for the transportation of passengers and the baggage of such pas-

sengers, from Chicago, Ill., and other points on the Chicago & North Western Railway between Chicago and Council Bluffs, Iowa, including the latter point, and from points on the Union Pacific Railroad between Colorado common points, so called, on the west and Omaha, Nebr., and Kansas City, Mo., on the east, including the latter two points, via Portland, Oreg., to points in the State of Washington, on the Northern Pacific Railway between said Portland and Seattle, Wash., including the latter point; said joint rates to be the same as the joint rates contemporaneously in effect between said points via the Northern Pacific Railway and its present connections.

It is further ordered, That the carriers named in paragraph 2 of this order be, and they are hereby, notified and required to establish on or before said July 1, and maintain in force thereafter during a period of not less than two years, through routes and joint rates applicable thereto, for the transportation of passengers and the baggage of such passengers, from said points on the Northern Pacific Railway via Portland, Oreg., to said points on the Union Pacific Railroad and to said points on the Chicago & North Western Railway, including Omaha, Nebr., Kansas City, Mo., and Chicago, Ill., said joint rates to be the same as the joint rates contemporaneously in effect between said points via the Northern Pacific Railway and its present connections.

26 And it is further ordered, That said carriers be, and they are hereby, authorized to make effective upon three days' notice to the public and to the Interstate Commerce Commission, given in the manner required by law, the through routes and joint rates said carriers are by this order required to establish and maintain in force, but the tariffs must contain a reference to the number of this case and show that they are issued under the authority hereby granted.

27 It is true, as found by the commission, that the testimony upon such hearing showed a large number of passengers, an average of about eight thousand (8,000) a year, have been traveling over the Union Pacific lines through Portland between various eastern points and Puget Sound points upon the Northern Pacific, and your orator has always declined to make joint rates and to sell through tickets and permit through checks of baggage via that line, furnishing as it does a line of its own open to the same passengers which is reasonable and satisfactory and which would give your orator a haul of either nineteen hundred (1,900) or one thousand (1,000) miles, as the case may be, as compared with the haul from Portland to Puget Sound points averaging about one hundred forty (140) miles. It is not true, as stated in the opinion of the commission, that the number of passengers who actually take this route would not be materially increased by establishing a through joint route, selling through tickets and checking through baggage via Portland. The testimony taken before the commission showed beyond any contro-

very that the number of passengers taking that route would be greatly increased and the revenue of your orator greatly diminished by establishing the aforesaid joint route through Portland. The whole testimony of the large number of witnesses examined on behalf of the Union Pacific lines was that the travel via the Union Pacific and Portland would be largely increased by opening the proposed joint route, and no testimony to the contrary was introduced by any party or given by any witness. It was also shown by undisputed testimony that the Union Pacific lines had for many years been advertising a through route to Puget Sound via Portland; that their practice is to sell attached to their Portland ticket a coupon or order,

in form not shown in the testimony, entitling the holder on
28 arrival at Portland to obtain a ticket at the proper offices of the Oregon Railroad & Navigation Company at Portland without further payment, entitling the holder to ride over the Northern Pacific Railway from Portland to Puget Sound, and entitling him to recheck his baggage at Portland for destination. This Northern Pacific ticket is purchased by the Union Pacific lines and given to their passengers at Portland. The testimony also showed that such passengers frequently understand that the tickets furnished them in the east by the Union Pacific lines are through tickets to Puget Sound points on the Northern Pacific and that their baggage is checked through, and that any unusual annoyance at Portland, such as failure on the part of such passengers to secure tickets and to recheck their baggage, is caused by this misunderstanding resulting from agents of the Union Pacific holding out their route via Portland as a through route to Puget Sound and from their professing to ticket passengers through.

On the said hearing not a word of testimony was introduced to show that either the cold, or the snow, or the water make it at any time of the year less safe or comfortable to travel via your orator's line than it would be via the Union Pacific line through Portland. All that is said in the commission's opinion upon that subject is said without the least support from any testimony and can be maintained only in so far as true in fact and in so far as the commission may take judicial notice of weather conditions. In point of fact had testimony of the kind been offered your orator would have been prepared to show that its route at all seasons of winter or summer is as free from interruptions and delays by snow, water, and the weather, and that it is, so far as weather is concerned, as comfortable for passenger travel as the Union Pacific route through Portland. In fact either
route is at times interrupted by snow or water, but your orator's
29 route not more so than the Union Pacific and almost invariably when one route is interrupted similar conditions prevail upon the other route.

It was conclusively shown in the testimony and is admitted in the commission's opinion that your orator's route in point of service and in so far as concerns the transportation itself is superior to the route through Portland, and that the considerable number of passengers,

who prefer the route through Portland, base such preference wholly upon their wish to stop over at Portland or in the country tributary to the Union Pacific lines before reaching Portland for business or pleasure, or their desire to see the country tributary to those lines.

Your orator's line reaching Portland through Tacoma and Seattle, its rates to Puget Sound points and to Portland are the same, and the Union Pacific lines in order to compete to Puget Sound points are obliged to make the Portland rate. The local fare on your orator's line from Portland to Puget Sound points varies to different points, but averages substantially five dollars, while your orator's revenue on every passenger it carries from eastern termini or from Billings is very much larger. The Seattle and Tacoma terminals of your orator have been purchased and put into condition for use at the expense of many millions of dollars and, as before stated, were established largely for the long haul business and in the reasonable expectation of obtaining all for which it furnishes accommodations and facilities superior to those of other lines. The operation of the defendant's order is to deprive your orator of a large amount, how much cannot be determined, of this through travel and give it in lieu thereof the short haul from Portland to Puget Sound, depriving your orator of the reasonable and legitimate value of its railway and particularly of its Seattle and Tacoma terminals and turning the use thereof

30 over to the Union Pacific lines without adequate compensation.

The enforcement of the order before set forth would deprive your orator of revenue exceeding two thousand dollars (\$2,000.00), exclusive of interest and costs, and would result to your orator's irreparable injury.

Inasmuch as your orator has no adequate remedy at law and has only a remedy in equity, it prays that a decree be entered herein setting aside and annulling said order of the defendant Interstate Commerce Commission and perpetually enjoining the enforcement thereof and perpetually enjoining the said defendant, its members, their agents, servants, and representatives, from enforcing said order or from taking any steps or instituting any proceedings for the enforcement thereof, and for a temporary injunction to the effect above stated pending this suit, and for such other and further relief as justice and equity may require.

Your orator further prays for a writ of subpoena, directed to the said Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified, to appear before your honors in this honorable court, and then and there full, true, and complete answer make in the premises; but not under oath (an answer under oath being expressly waived), and to stand to and abide such order and decree herein as to your honors may seem meet to equity and good conscience.

NORTHERN PACIFIC RAILWAY COMPANY,
By J. M. HANNAFORD,

Second Vice-President,

CHARLES W. BUNN,
Solicitor and of Counsel,

31 STATE OF MINNESOTA,
County of Ramsey, ss:

J. M. Hannaford, being first duly sworn, on oath states that he is the second vice-president of the Northern Pacific Railway Company, and as such has general charge of its traffic; that he has read the foregoing bill of complaint, and the same is true to the best of his knowledge, information, and belief.

J. M. HANNAFORD.

Subscribed and sworn to before me this 24th day of May, 1909.

W. T. FRANCIS,

Notary Public, Ramsey County, Minn.

My commission expires April 5, 1911.

[Notarial seal.]

(Endorsed:) Bill of complaint. Filed May 25th, 1909. Henry D. Lang, clerk.

32 Thereafter and on the same day the following praecipe for appearance for complainant and order of appearance was filed and entered of record in said cause, to wit:

33 Circuit Court of the United States, District of Minnesota,
Third Division.

NORTHERN PACIFIC RAILWAY COMPANY	} Appearance.
<i>vs.</i>	
THE INTERSTATE COMMERCE COMMISSION.	

The clerk will enter my appearance for the complainant, and he is requested not to issue a chancery subpoena herein.

Dated St. Paul, Minnesota, May 25th, A. D. 1909.

CHARLES W. BUNN,

Complainant's Solicitor.

(Endorsed:) Appearance of C. W. Bunn for complainant. Filed May 25th, 1909. Henry D. Lang, clerk. Entered C. R. "C" page 145.

34 United States Circuit Court, District of Minnesota, Third
Division.

Chancery Common Rule and Order Book.

May 25th, 1909.

NORTHERN PACIFIC RAILWAY COMPANY	} Equity No. 893.
<i>vs.</i>	
INTERSTATE COMMERCE COMMISSION.	

The complainant having filed a bill of complaint in this cause on application of C. W. Bunn, solicitor, ordered that no writ of subpoena issue as herein directed. Page 9.

35 United States Circuit Court, District of Minnesota, Third Division. Chancery Common Rule and Order Book.

May 25th, 1909.

NORTHERN PACIFIC RAILWAY COMPANY }
vs. } Equity No. 893.
INTERSTATE COMMERCE COMMISSION. }

This day comes the complainant, the Northern Pacific Railway Company, by Charles W. Bunn, solicitor, on whose motion it is ordered that his appearance be, and the same is hereby, entered as solicitor for said complainant. Page 145.

Thereafter and on the 27th day of May the following certificate of the Attorney-General was filed in said cause, to wit:

36 In the Circuit Court of the United States, District of Minnesota, Third Division.

NORTHERN PACIFIC RAILWAY CO. }
vs. } 893, Equity.
INTERSTATE COMMERCE COMMISSION. }

To the clerk of said court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Northern Pacific Railway Company against the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of February 4, 1887, entitled 'An act to regulate commerce,'" approved February 11, 1903, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the circuit judges of the eighth circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the circuit judges of said circuit, as is provided by the said act of February 11, 1903.

GEO. W. WICKERSHAM,
Attorney-General.

WASHINGTON, D. C., May 25, 1909.

(Endorsed:) Certificate of the Attorney-General under the acts of Feby. 11, 1903, etc. Filed, May 27th, 1909. Henry D. Lang, clerk.

37 And thereafter on the same day the following certificate of clerk of delivery of certified copies of Atty.-General's certificate to U. S. circuit judges, was filed in said cause, to wit:

20 INTERSTATE COMMERCE COMMISSION VS. N. PAC. RY. CO.

38 United States Circuit Court, District of Minnesota, Third Division.

NORTHERN PACIFIC RAILWAY COMPANY }
vs. } Equity No. 893.
INTERSTATE COMMERCE COMMISSION. }

UNITED STATES OF AMERICA.

District of Minnesota, ss.

I, Henry D. Lang, clerk of the Circuit Court of the United States for the district of Minnesota, do hereby certify that at St. Paul, in the county of Ramsey, district of Minnesota, on the 27th day of May, A. D. 1909, I made and delivered to each of the circuit judges of the eighth circuit, to wit: Hon. Walter H. Sanborn, Hon. Willis Van Devanter, Hon. William C. Hook, Hon. Elmer B. Adams, personally, a duly certified copy of the certificate of the Attorney-General, this day filed in this case to expedite the same, as provided by the act of February 11, 1903.

In witness whereof I have hereunto set my hand and official seal, this 27th day of May, A. D. 1909.

[SEAL OF COURT.]

HENRY D. LANG, *Clerk.*

(Endorsed:) Certificate of clerk of delivery of certified copies of Atty.-General's certificate to U. S. circuit judges. Filed May 27th, 1909. Henry D. Lang, clerk.

39 Thereafter and on the 28th day of May, 1909, the following appearance for defendant and order was entered in said cause, to wit:

40 Circuit Court of the United States, District of Minnesota, Third Division.

NORTHERN PACIFIC RAILWAY COMPANY }
vs. } Appearance,
THE INTERSTATE COMMERCE COMMISSION. }

The clerk will enter our appearance for the defendant in the above-entitled cause.

Dated St. Paul, Minnesota, May 28th, 1909.

CHARLES C. HOUPT,

LUTHER M. WALTER,

Defendant's Solicitors.

(Endorsed:) Appearance of Chas. C. Hought and Luther M. Walter for defendant. Filed May 28th, 1909. Henry D. Lang, clerk. Entered C. R. "C," page 145.

41 United States Circuit Court, District of Minnesota, Third Division.

Chancery Common Rule and Order Book.

May 28, 1909.

NORTHERN PACIFIC RAILWAY COMPANY	} Equity No. 893.
<i>vs.</i>	
INTERSTATE COMMERCE COMMISSION.	

This day comes the defendant Interstate Commerce Commission by Charles C. Houpt and Luther M. Walter, solicitors, on whose motion it is ordered that the appearance of said defendant be, and the same is, hereby entered. Page 145.

Thereafter and on the same day the following record of trial was entered of record in said cause, to wit:

42 United States Circuit Court for the District of Minnesota, Third Division.

Term minutes. June term. A. D. 1908. May 28th, 1909.

Friday morning.

Court opened pursuant to adjournment.

Present: Hon. Walter H. Sanborn, Hon. Willis Van Devanter, Hon. William C. Hook, Hon. Elmer B. Adams, circuit judges, Henry D. Lang, clerk.

43 United States Circuit Court for the District of Minnesota, Third Division.

Term minutes. December term. A. D. 1908. May 28th, 1909.

NORTHERN PACIFIC RAILWAY COMPANY	} No. 893 C. Equity.
<i>vs.</i>	
THE INTERSTATE COMMERCE COMMISSION.	

This day come the parties to this cause by their respective solicitors, Mr. Charles W. Bunn appearing on behalf of the complainant, and Mr. Luther M. Walter appearing on behalf of the defendant.

Whereupon the complainant, by Mr. Charles W. Bunn its solicitor, moves the court for an order restraining the defendant, The Interstate Commerce Commission, during the pendency of this action and until the further order of this court, from enforcing and putting into effect the order of May 4th, A. D. 1909, No. 1541, set out and referred to in the bill of complaint, herein.

Mr. Charles W. Bunn argues said motion on behalf of the complainant.

Mr. Luther M. Walter argues in opposition thereto on behalf of the defendant.

Mr. Charles W. Bunn argues in reply and conclusion upon said motion on behalf of the complainant; and after hearing the arguments and statements of the solicitors for the respective parties hereto thereon, the same is duly submitted to and by the court taken under advisement.

44 United States Circuit Court for the District of Minnesota,
Third Division.

Term minutes. December term. A. D. 1908. May 28th, 1909.

Ordered: That this court do now adjourn until tomorrow morning at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk*.

45 And on the same day the following papers and exhibits were filed in said cause, viz:

Report and order of the commission, decided May 4, 1909.

Brief of defendant.

Brief of complainant.

Brief of Union Pacific Rd. Co. et al.

Map, showing N. P. Ry. System and C. B. & Q. R. R. System.

Stenographer's minutes, before the Interstate Commerce Commission Docket No. 1544. In the matter of Through Passenger Routes via Portland, Oregon.

46 Opinion No. 938.

Before the Interstate Commerce Commission.

No. 1544.

In the matter of through passenger routes via Portland, Oreg.

Decided May 4, 1909.

Report and order of the Commission.

(Endorsed:) Filed May 28th, 1909. Henry D. Lang, clerk.

In the matter of through passenger routes via Portland, Oreg.

Submitted April 3, 1909. Decided May 4, 1909.

The Northern Pacific Railway Company, the Union Pacific Lines, and the Chicago & Northwestern Railway Company ordered to join in the sale of through passenger tickets between Seattle and other points in the northwest and eastern destinations, via Portland, Oreg., and to accord through facilities, like the checking of baggage, over this route.

A. H. Lossow for the Interstate Commerce Commission.

C. W. Bunn for Northern Pacific Railway Company.

S. A. Lynde for Chicago & Northwestern Railway Company.

N. H. Loomis, P. L. Williams, W. W. Cotton, and F. C. Dillard for Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon Railroad & Navigation Company.

Report of the Commission.

PROT TY, Commissioner:

The Northern Pacific Railway Company declines to join in the sale of through tickets between Seattle and other points in the northwest and eastern destinations via Portland, Oreg., and to accord through facilities, like the checking of baggage, over this route, and this leads to much annoyance and has been the source of much complaint. The commission, being in receipt of complaints from the traveling public, and deeming the subject of sufficient public importance to require investigation, has instituted this proceeding upon its own motion for the purpose of determining the right of the matter and, if necessary, entering an order for the establishment of through routes and joint rates.

The Northern Pacific Railway Company, the Chicago & Northwestern Railway Company, and the Union Pacific lines, namely, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company, were made parties and required to answer. The Northern Pacific justifies its refusal. The answers of the various Union Pacific companies are in the nature of complaints themselves; they aver that a through route should, for reasons set forth, be opened, and ask that the Commission establish such joint rates.

The parties have furnished certain information called for by the commission itself, have introduced such testimony as they severally desired, and have presented the case on brief and oral argument.

In this discussion Tacoma will be taken as illustrative of those points in the northwest which are involved. The Northern Pacific Railway extends from St. Paul to Tacoma, and it also operates a line from Seattle through Tacoma to Portland. Numerous lines of railway lead from Chicago to St. Paul.

The Union Pacific lines extend from Omaha to Portland, and various other lines connect Chicago and Omaha.

Hence, a passenger at Chicago can reach Tacoma either via St. Paul and the Northern Pacific or via Omaha and the Union Pacific lines to Portland and from Portland via the Northern Pacific.

The Chicago, Burlington & Quincy Railroad, which is owned and controlled by the Northern Pacific and the Great Northern jointly, runs from Omaha, Kansas City, and other Missouri River points to Billings, Mont., where it connects with the Northern Pacific. The Union Pacific lines extend from Omaha, Kansas City, and other Missouri River points to Portland. Passengers at the Missouri River may therefore travel to Tacoma either via the Burlington route to Billings and thence via the Northern Pacific or via the Union Pacific lines to Portland and thence via the Northern Pacific.

Since practically all passenger traffic between territory east of the Missouri River can and does pass through Chicago and Missouri River points en route for Tacoma, the points above selected fairly illustrate the general situation and the question presented.

When the northern route is used the Northern Pacific may carry the passenger from St. Paul to Tacoma, a distance of 1,300 miles, and must carry him from Billings, a distance of about 1,000 miles, while if the Union Pacific route is selected, the Northern Pacific can only transport the passenger from Portland to Tacoma, a distance of 140 miles. The Northern Pacific declines to make joint rates with the Union Pacific lines, for the reason that to do so would be to encourage the movement of travel through Portland, and thereby to deprive it of the privilege of carrying the passenger by the other route and thus obtaining the long haul.

The act to regulate commerce empowers this commission to establish a through route and a joint rate in cases like the present, provided no satisfactory through route already exists. The Northern

49 Pacific insists that it already affords a satisfactory through route to points upon its line north of Portland, and hence that the commission has no jurisdiction to open the Portland gateway, even though, as a matter of discretion, it might be of the opinion that this ought to be done.

In *Pacific Coast Lumber Mfrs. Assn. v. Northern Pacific Ry. Co.*, 14 I. C. C. Rep., 51, the commission passed upon an application to open the Portland gateway to the movement of lumber from Tacoma and similar points to eastern destinations over the lines of the Union Pacific and its connections. In that proceeding we held that the Northern Pacific and Great Northern already furnished a satisfactory route to Colorado common points, which are Cheyenne, Denver, Pueblo, and points in that general line north and south, and all territory east, but that there was no satisfactory through route to territory west of Colorado common points, and we established joint rates applicable to that territory to which no satisfactory route was found to exist.

Up to the time that case was decided, and indeed when this proceeding was begun, there was no joint through passenger tariff between the Union Pacific lines and the Northern Pacific through Portland. Since then the Northern Pacific has expressed a willingness to establish joint passenger schedules from Colorado common points and territory west to Tacoma and similar points and such tariffs are now in effect. It still refuses to make joint rates from territory east of Colorado common points. It insists that the same considerations which led us to hold in case of lumber that a satisfactory route already existed by the northern lines to that territory must control our action in the present case.

In the report of that case, at page 59, we said:

"Attention should be called to the fact that a wide difference exists between a reasonable through route for the movement of freight and one for passenger traffic. There enters into the passenger service a personal element which does not exist in the case of property. We might well say that a passenger should have the right to journey from Seattle to Omaha via Portland with the conveniences of a through service, although a carload of lumber was not entitled to that privilege."

This was not intended to indicate what would be a satisfactory passenger route, but simply to reserve for consideration that question, which is now for the first time before the commission in this proceeding.

In order to defeat the jurisdiction of the commission the existing route must, in the language of the statute, be "reasonable or satisfactory." This, we think, is equivalent to "reasonably satisfactory." The dissatisfaction of the passenger must spring from some reason and not be the product of mere whim.

50 The first inquiry is, With respect to whom must this route be satisfactory? This same question might arise in case of freight traffic. A route satisfactory to one kind of freight might not be satisfactory with respect to another. Most commodities are indifferent to heat and cold, and it is therefore immaterial whether they are carried through high or low temperatures. Fruits and vegetables may be injured and indeed totally destroyed by freezing or overheating. It might well happen, therefore, that a route entirely satisfactory as to most kinds of freight would not be satisfactory to these perishable articles.

In the case of freight it is possible to distinguish between different commodities and to establish a through route as to one article and not as to another; but with passengers this can not be done, since whatever joint rate is ordered must be open to the general public. It would seem, therefore, that if the existing route is unsatisfactory to any considerable portion of the public desiring to use some route, then it should not be held reasonably satisfactory.

To state this in another way: The caprice or even the proper desire of an occasional passenger should not govern, but if any considerable part of the traveling public reasonably prefer to use some other route

rather than the one existing, then the existing route can not be called a reasonable and satisfactory through route. We ought to inquire, therefore, in the present case, whether any substantial part of the entire body of travelers moving between these points in the northwest and eastern destinations does reasonably desire to travel via Portland. If so, this commission has jurisdiction to open that gateway. And this is the reasonable conclusion from all the provisions of the act which bear directly or indirectly upon this establishment of through routes and joint rates. Under the original act it was provided that different railroad companies should interchange traffic with one another; but the act contained no provision by which the details of this interchange could be determined, and the courts held that, as at the common law, it was for the carriers to determine for themselves what arrangements for through business should be entered into and upon what terms. The act was finally amended so as to give to the commission authority to prescribe through routes and joint rates, and to fix the terms and conditions under which these routes should be operated; but the commission was only authorized to do this where no reasonable or satisfactory route already existed. The plain intent of all these provisions comes to this: The public shall be properly served. So long as it is properly served the carriers may themselves determine upon the means by which the service shall be rendered. The fundamental question in every case is, Are the public necessities, under all the circumstances, fairly met? Such is 51 the question here. Considering fairly the legitimate desires of those who use these railway lines, ought the facilities of through travel via the Portland gateway to be accorded, or is the present arrangement reasonable and satisfactory?

By what test are we to determine what is reasonable and satisfactory? The Northern Pacific contends that the same considerations which apply in case of freight must also control in case of passengers; that reference can only be had to the incidents of the transportation itself; that if it offers a route by which the passenger can be taken as quickly and with the same physical comfort, then the passenger can not reasonably prefer another route.

The distance from both Chicago and the Missouri River to Tacoma via St. Paul or Billings is somewhat less than via Portland. From Chicago via St. Paul the distance is 2,319 miles, while via Omaha and Portland it is 2,436 miles. From Omaha via Billings the distance is 1,909 miles; via Portland, 1,943 miles. The running time from Chicago and the Missouri River is somewhat less via St. Paul and Billings than via Portland. The train service from St. Paul is equally good with that from Omaha. At the present time there is but one through train from the Missouri River via Billings, with a second train involving a change of cars at Billings and a lay over. It was stated upon the hearing that another through train would be put on in the near future and permanently maintained.

On the whole it seems to be true that from the greater part of the territory in question, and we are only considering the matter in its

broad aspect, the distance via the northern lines is somewhat shorter and the time somewhat less. The passenger goes in as good a car and is provided with as good a berth and as good a meal. Beyond this the Northern Pacific declares the passenger must not look.

It is evident that, looking entirely to the physical comfort of the passengers, the northern line is not always as satisfactory as the southern. That route traverses a section of country where the cold is much more severe in winter and longer continued. The snows are more frequent and deeper. Interruption of travel from snow blockades and similar causes is much greater. Passengers might find it not only less comfortable, but in some instances even dangerous, to take the journey by this route, although by the southern line it might be undertaken with comfort. Upon the other hand, during the heated period of the summer the northern route may be much cooler and cleaner than the southern.

So, too, looking entirely to the certainty with which one reaches in a given time his journey's end, the southern route may at times present advantages over the northern, which would lead a reasonable man to prefer it. The severe weather during the winter months inter-

52 rupts to some extent travel upon that line. The period of high water comes at a different time upon the southern lines than upon the northern. Communication may be more certain at one period of the year by one line and at some other period by the other line. We are considering the character of these routes, not with respect to a single day or a single season, but with respect to the whole year and to a series of years. May it not be well said that the traveling public, even if the test suggested by the Northern Pacific were the correct one, even if the only inquiry was whether the passenger could reach his journey's end with certainty and comfort, are entitled to have these two routes open; and can it be said that the public should be confined at all times to the use of either one?

But these are minor considerations. The real question is that suggested by the commission in the extract from the Lumber case, already given. Is there not a distinction between inanimate freight and human beings? Does not the element of personal preference properly enter into the determination of this question?

Let this situation be clearly understood. If the passenger travels by the Northern Pacific route, he can pass, broadly speaking, through no territory lying west of the Missouri River and south of the main line of the Northern Pacific. If he goes via Portland, he can select any one of a great variety of routes traversing this southern territory as far as Ogden. From Ogden he must go by the Union Pacific lines. The question is, therefore, whether the passenger desiring to go from some eastern point to Tacoma must patronize the northern route or whether he may properly prefer to pass over some one of these southern routes.

A passenger by the Union Pacific route may visit numerous cities which he could not reach via the northern lines, like Denver, Pueblo, Salt Lake City, Ogden. In these cities are many objects of interest,

which he may desire to behold. He may have friends upon some of these routes whom he wishes to visit, and most of these lines allow liberal stop-over privileges, of which the traveler may avail himself. Shall he be deprived of all this and compelled to travel by a route which may possibly extend the same privileges, but upon which those privileges are to him utterly useless?

The portion of our country which to-day presents the greatest opportunity for the acquisition of new homes and the opening of new enterprises is that traversed by these transcontinental lines. The United States Government is expending vast sums of money for the purpose of bringing into cultivation hundreds of thousands of acres of land. Many home seekers visit the northwest, and inducements are held out to such travelers by all the railways. Shall not the passenger in search of a home have the right to go by whatever one of these various routes he selects?

53 Some lines present much greater scenic attractions than others, and the scenery differs greatly upon different lines. May not a traveler reasonably select his route with reference to the natural beauties which it offers? May he not properly desire to inform himself of the extent and character of the country of which he is a citizen? Being familiar with one line, may he not reasonably desire to behold the beauties and the business advantages of some other line?

The education and gratification of the sense of the sublime and the beautiful have been recognized in all ages as distinguishing marks of civilization. Governments often provide at the public expense objects of beauty to be gazed upon by the masses. Can it be said that the desire to behold what is attractive in nature is not a desire which the traveler may reasonably indulge? Is this an age so intensely material that the only test of reasonable satisfaction is business necessity and animal comfort?

The United States Government has reserved and set apart a national park, where the citizens of our land may behold the beauties of nature. It has withdrawn from the possible touch of materialism and reserved for the contemplation of present and future ages a portion of our country; and is it to be said that a wish to behold these marvels which have been set apart for the sole purpose of being looked at is not a reasonable wish? May not a traveler reasonably elect that route which will enable him to do this? And if it is reasonable to desire to behold the marvels of Yellowstone Park, is it not equally reasonable to wish to behold the scenic beauties of the Denver & Rio Grande?

It may be profitable to bring this contention of the Northern Pacific to the test of a practical illustration. The Union Pacific lines extend from Ogden to Portland, and they are the only lines by which the traveler, having arrived at Ogden, can reach the city of Portland. From Omaha and Kansas City, as well as from Denver, the Union Pacific maintains a line to Ogden. Passengers on the Missouri River or at Colorado common points desiring to visit Portland can go via the Union Pacific lines, and those lines are the shortest and the quickest and are provided with the best of equipment and service.

It is possible for the traveler leaving Chicago or St. Louis for Portland to go by a great variety of routes to Ogden. He may take the Burlington or the Rock Island or the Missouri Pacific or the Santa Fe. Being arrived at Colorado common points, he may proceed to Ogden via the Denver & Rio Grande or the Colorado Midland, as well as by the Union Pacific.

Now, may the Union Pacific say to the traveling public, "We offer you a line from the East to Portland as short, as quick, as comfortable; therefore you must travel by our route. If you see fit to travel by any other route up to Ogden, you must, upon your arrival there, stop, recheck your baggage, rearrange your Pullman accommodations, purchase a local ticket—in short, go as a local passenger from Ogden to Portland. We will make no through route and no through arrangement with any line which leads from the East to Ogden, because we furnish a satisfactory line of our own, which you must patronize."

No proposition of that sort would be tolerated for a moment; and why? Because it is instinctively recognized that a passenger at some eastern destination may properly select, and should be permitted to select, the route by which he will reach Ogden on his way to Portland.

So of the situation before us. Just as Ogden is a gateway through which streams of travel converging from various directions naturally pour, so does travel from the east to the northwest flow through the city of Portland.

The parties were required to furnish a statement showing the number of passengers who actually do, even at the present time, travel between these northwestern points and eastern destinations via Portland. Those statements cover five years—from 1904 to 1908, inclusive—and show the total number of such passengers to be nearly 40,000, an average of 8,000 persons per year or 22 per day. A good deal of testimony was introduced by the Union Pacific lines to show a desire upon the part of the traveling public to go via Portland, and that testimony does, of itself, conclusively establish the fact; but the most satisfactory proof is the actual record of what daily happens.

We are of the opinion, and find, that a substantial part of those actually making the journey between these points in the northwest and various points in the east to the east of Colorado common points prefer to travel via the lines which lead finally through the Portland gateway. We are of the opinion that the desire of this portion of the public to use those routes is a reasonable one, and therefore that the northern route offered by the Northern Pacific is not, within the contemplation of the statute, and as to such travelers, a reasonable or satisfactory through route.

The statute provides that the commission may establish through routes and joint rates, but does not require it to do so. There is, therefore, in this case the further question: Ought we, under all the circumstances, to open this Portland gateway?

The first-class passenger fare from the territory in question is the same to Portland, Tacoma, and Seattle, and the Pullman fare is also the same to these three destinations. The local fare from Portland to Tacoma over the Northern Pacific is \$4.35, the berth fare \$2, and the seat fare 75 cents. If, therefore, a passenger were compelled to pay the transcontinental fare to Portland and the local fare
 55 from Portland to Tacoma, it would cost him \$4.35 extra without the Pullman accommodation, whereas if the same rate were applied via Portland which obtains via other gateways this extra local fare, both railroad and Pullman, would be saved.

It will hardly be claimed that there is any substantial reason why the 8,000 persons who annually journey through Portland to Tacoma and similar points should be required to bear these additional charges, when the Union Pacific lines stand ready to name the same through rate via Portland and to allow the Northern Pacific its full local. If, therefore, this were the actual situation, we should have no hesitation in saying that the through route should be established.

In point of fact the Union Pacific at the present time accords to individuals desiring to reach Tacoma what it terms a "side trip." It sells to the passenger a ticket to Portland, to which is attached a coupon entitling him to a first-class ticket from Portland to Tacoma. The Northern Pacific and the Union Pacific occupy a union depot at Portland, and the ticket agent at that station is a joint agent. This coupon must be presented to that joint agent, who delivers to the passenger a Northern Pacific ticket and who pays to the Northern Pacific Company from the Union Pacific Company's funds in his hands the full local fare. Baggage can only be checked to Portland and the passenger is obliged to have this rechecked at Portland.

The testimony shows that agents at the point of origin as a rule inform passengers desiring to purchase tickets via Portland of the method which must be pursued at Portland in obtaining transportation and checking baggage beyond; that in some instances the passenger has declined to go by this route, but that usually, notwithstanding the difficulties, the passenger, while often demurring at the hardship, takes the route which he has selected.

It appeared that very much annoyance and inconvenience was occasioned at Portland. Sometimes it happened that passengers would board the Northern Pacific train without having exchanged the order for a ticket, under the impression that the order was itself a ticket. The greatest difficulty was experienced in the handling of baggage; in many instances the passenger would go on under the impression that his baggage had been checked through. Frequently the baggage had not actually arrived at Portland upon the same train with the passenger. These difficulties were oftenest experienced by those who would suffer most from the annoyance and be less able to rectify the mistake—women and children unattended and persons of little experience in traveling. These mistakes are of daily occurrence and occasion very serious inconvenience.

The legality of the present expedient employed by the Union Pacific to work business through this gateway is extremely doubtful. The number of passengers who actually take this route is not materially less than it would be if a through route was established. Some few travelers are doubtless deterred by the difficulties of passing through Portland from taking this line, but the testimony fairly shows that this number is insignificant. The present arrangement imposes a great hardship upon the traveling public and results in practically no benefit to the Northern Pacific. If the Northern Pacific has the right to close this gateway, it should be closed, and the public should understand it; if it has not that right, then the gateway should be opened. The present situation produces much irritation, and is of no substantial benefit to the Northern Pacific.

It should also be noted that under the present arrangement, while the passenger receives his train fare from Portland to destination, he is obliged to pay the additional Pullman fare, whereas it was stated upon the hearing that the Pullman Company would sell, if there were a through route, a ticket to Tacoma for the coast price, which would entitle the passenger to space between Portland and Tacoma.

At the present time the passenger at Chicago may travel on a through ticket via St. Paul and the Canadian Pacific lines to Tacoma, in which event the Canadian Pacific carries the passenger to Sumas and the Northern Pacific from Sumas to Tacoma, a distance of about 160 miles. That passenger may also go via St. Paul and the Great Northern, the Northern Pacific securing the transportation from Seattle to Tacoma, a distance of 11 miles.

We feel that the passenger should also have the right to journey upon a through ticket via Portland, in which event the Northern Pacific would obtain a haul of 140 miles.

The right of a railroad to control its traffic by the making of arrangements for through routes and joint rates for the handling of both passenger and freight business is a thing of value to the railway, which should be protected in so far as it can be without infringing upon the right of the public; but these railroads are public servants and it is their first duty to accord to the public proper facilities.

We are in receipt of numerous letters, of petitions from various communities, from boards of trade and other commercial organizations, asking that this gateway be opened. The railroad commission of Oregon has joined its request, all of which indicates that there is a public demand for this route.

This commission has held that, with respect to freight business, the Northern Pacific and the Great Northern may absolutely control all territory east of and including Colorado common points. It is no hardship to say that, with respect to passenger business, the Northern Pacific must open its lines to this transcontinental travel.

We are of the opinion that the through rates via Portland

should be the same as those in effect via the Northern Pacific and its present connections. No opinion is expressed touching the division of these rates. The public interest requires that this gateway shall be opened; but the terms under which that service is rendered should be just as between the carriers themselves. The local fare upon the line of the Northern Pacific is not of necessity the measure of its division. If the carriers do not agree application can be made to the Commission, which must then hear the parties and decide the question.

KNAPP, Chairman, dissenting:

The majority report summarizes concisely the law in respect of the establishment of through routes and joint rates in the following language:

"The statute provides that the commission may establish through routes and joint rates, but does not require it to do so."

It follows, then, that before the commission can lawfully exercise its discretion in this respect, it must find that no reasonable or satisfactory through route exists; and when its jurisdiction is thus established, its discretion must be exercised upon sound considerations of justice to the public and the carriers. In this proceeding I conceive that both the jurisdictional facts and the equitable considerations essential to the lawful and proper exercise of the commission's authority are altogether lacking.

It appears from the record and is conceded by the majority that from all Missouri River points and territory east thereof the route already established offers to the public as reasonable fares and as comfortable accommodations as would be afforded by the proposed Portland route, and that in distance and time it is somewhat shorter. This being so, the existing route must, in my opinion, be held both reasonable and satisfactory within the meaning of the statute. Certainly the route shortest in time and distance, and equal to any other in the comforts provided for the traveler, can not be called an unreasonable route; and I assume, without arguing the point, that the term "satisfactory" as used in the statute is practically synonymous with "reasonable." Moreover, it seems to me that the majority err in taking into account, to the extent indicated, the incidental desire of the passenger to stop at intermediate points or to travel by a variety of routes. In my judgment, all that can be asked by a person seeking transportation from, say, Chicago to Tacoma is expeditious and comfortable passage between those two points. If he desires stop-over privileges or to visit cities which are not upon the reasonable route already established, he is asking an additional service or
 58 privilege for which extra compensation may properly be exacted. The absence of opportunities of this sort, or the lack of attractive scenery, does not make the quickest and otherwise satisfactory route an unreasonable one to be condemned as inadequate by the commission.

Much stress appears to be laid upon the inconvenience to passengers over the Union Pacific route of rechecking baggage and exchanging tickets at Portland. Even conceding that this is germane to the issue, it seems to me to arise largely because the Union Pacific, in order to secure the long haul to Portland, advertises a through route to Puget Sound which does not in fact exist. Under the present practice of the Union Pacific, the legality of which is not now considered, the passenger to Puget Sound pays no extra fare in order to gratify his desire to travel by that route, and it would seem that the trouble of rechecking baggage and exchanging tickets at Portland is fully compensated by the business convenience of stop-over privileges and other advantages of an incidental or personal nature.

But assuming, though not conceding, that the jurisdictional basis for an order exists, there are controlling reasons, as I think, for declining to take such action. The expensive terminals of the Northern Pacific at Tacoma and Seattle were not provided for local business from Portland, and apparently could not be afforded for that local travel. Those terminals are supported by traffic over the whole system. The order of the commission in this case in effect places the Union Pacific in substantially the same position as it would be if it had built its own railroad from Portland to Tacoma, some 140 miles. Except in so far as the regulating statute may prevent, carriers are at liberty to take such measures as may be proper to secure and retain traffic upon their own lines. I can not agree to a ruling in this matter which would go far to commit us to the proposition that a company might now build a railroad from, say, Trenton, N. J., to Crown Point, Ind., and successfully demand that the Pennsylvania system be required to join it in through routes east or west between New York and Chicago. Suppose the Northern Pacific ended at Tacoma and the Oregon Railroad and Navigation extended from Portland to Tacoma. Would it be just to require the Northern Pacific to unite with the Oregon Railroad and Navigation in joint rates to Seattle? In the absence of a real public necessity it seems plainly inequitable, by compelling connections and through routing, to take from a carrier traffic for the accommodation of which it has expended millions of dollars and practically turn over that traffic with the use of the carrier's terminals to a competitor which does not see fit to provide for itself the needful railway and terminals.

With reference to the exercise of discretion, it is of course true that the conclusions of the majority in this case will not be controlling in other proceedings, as each case must be judged in the light of its special conditions and circumstances. Nevertheless, the fact that the order made herein, if followed in cases of a similar character, will reverse the common practice of carriers of reserving to themselves the long haul where they can furnish satisfactory accommodations—a practice justified by the business welfare of the carrier, and nowise at variance with its public duty—suggests to my mind that the commission should not compel through routes and joint rates except upon a disclosure of real and substantial public

inconvenience and hardship which could not be otherwise avoided. In my judgment no such disclosure has been made in this case.

I am authorized to say that Commissioner Clark unites in this dissent.

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Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of May, A. D. 1909.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1544.

In the matter of through passenger routes via Portland, Oreg.

This case being at issue upon complaint and answers on file, and the matters involved having been fully heard and submitted, and it appearing that the carriers named in paragraph 2 of this order have neglected and refused to voluntarily establish through routes and joint rates for the transportation of passengers and the baggage of such passengers over their lines of railway from Chicago, Ill., and other points on the Chicago & North Western Railway between Chicago, Ill., and Council Bluffs, Iowa, including the latter point, and from points on the Union Pacific Railroad between Colorado common points, so called, on the west, and Omaha, Nebr., and Kansas City, Mo., on the east, including the latter two points, via Portland, Oreg., to points on the Northern Pacific Railway, in the state of Washington, between Portland, Oreg., and Seattle, Wash., including the latter point, and in the opposite direction from said points on the Northern Pacific Railway, via Portland, Oreg., to said points on the Union Pacific Railroad and on the Chicago & North Western Railway; and it further appearing that no reasonable or satisfactory through route for such transportation exists between any of said eastern points on the one hand and any of said western points on the other hand:

It is ordered, That the Chicago & North Western Railway Company, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, the Oregon Railroad & Navigation Company and the Northern Pacific Railway Company, be, and they are hereby, notified and required to establish on or before July 1, 1909, and maintain in force thereafter, during a period of not less than two years, through routes and joint rates applicable thereto, for the transportation of passengers and the baggage of such passengers, from Chicago, Ill., and other points on the Chicago & North Western Railway between Chicago and Council Bluffs, Iowa, including the latter point, and from points on the Union Pacific Railroad between Colorado common points, so called, on the west and Omaha, Nebr., and Kansas City, Mo., on the east, including the latter two points, via Portland, Oreg., to points in the state of Washington, on the North